

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HEATHER OPEL,

Plaintiff,

V.

DEPARTMENT OF CORRECTIONS,  
JANE PARNELL, NORM CALDWELL,  
GINA ROSENDALE, ALEXIS  
STROMBERG, C/O J LABOON, C/O J  
TROUDT, C/O COOPER, C/O  
KALEOPA, SGT LARRY BELFOR.

### Defendants.

No. C14-5160RBL/KLS

## **REPORT AND RECOMMENDATION**

**Noted for: NOVEMBER 21, 2014**

Before the Court is Defendants' Motion to Dismiss. Dkt. 20. Plaintiff, Heather Opel, opposes the motion. Dkt. 25. Ms. Opel is a Washington State inmate currently housed at the Washington Corrections Center for Women (WCCW). Ms. Opel alleges that her due process rights were violated in a disciplinary hearing when the hearings officer turned off the tape recorder and told her not to appeal. Dkt. 7, p. 3. Plaintiff also states that her due process rights were violated by the Superintendent not overturning her infraction on appeal. *Id.* Further, Ms. Opel claims that she was harassed by staff after she returned from being in segregation and that

1 her rights were violated when prison officials would not let her room with the person of her  
2 choice, inmate Van Hooser. *Id.* Ms. Opel also says that she is being harassed by certain prison  
3 staff who refer to a barrier used to keep offenders out of a certain area as “Opel Gate.” Dkt. 7, p.  
4 3. In the relief section of the complaint Ms. Opel states that she is seeking relief from  
5 discrimination based on “appearance,” but she does not explain what she means by the term  
6 “appearance.” Dkt. 7, p. 4.  
7

#### 8 STATEMENT OF FACTS

9 For the purposes of this motion, the allegations contained in Ms. Opel’s complaint (Dkt.  
10 7) are accepted as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 On January 6, 2012, Lieutenant Cooper, who is not a named defendant, sent Ms. Opel to  
12 segregation after she was infracted for violating two prison rules. Dkt. 7, p. 6 (letter to Mr.  
13 Caldwell). The violations were for rule number WAC 137-25-030-709 (709) (being in an  
14 unauthorized area), and rule number WAC 137-28-220-244 (244)(unauthorized display of sexual  
15 affection). *Id.* The 709 is a serious infraction while the 244 is a general infraction. In the  
16 infraction report the infracting officer states:  
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18 I walked over to the booth area to check on the status of the booth worker and I  
19 observed offender Opel, Heather doc#845115 and offender VanHooser  
doc#327585 inside the equipment booth kissing each other mouth to mouth. I  
20 asked for the offenders ID’s and then called the shift Lt.

21 Dkt. 7, p. 8.

22 Ms. Opel alleges that during her disciplinary hearing the hearings officer, who is not a  
23 named defendant, turned off the tape recorder and told her not to try filing an appeal. Dkt. 7, p.  
24 3. Ms. Opel states that after the hearing the infracting officer changed his statement and spoke to  
25 her Custody Unit Supervisor, Defendant Rosendale. *Id.* Ms. Opel alleges that she filed a late  
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1 appeal and that the Superintendent, Jane Parnell, denied the appeal. Dkt. 7, p. 3. Ms. Opel then  
2 sent a letter to the Secretary of the Department of Corrections asking that the infraction be  
3 overturned. Dkt. 7, p. 12. Ms. Opel does not disclose if the infraction was ever overturned.

4 Ms. Opel attached another infraction that she received on January 6, 2012, to her  
5 complaint. This is the same day that Ms. Opel was removed from the gym and taken to  
6 segregation. In the second infraction report a correctional officer states that a search of the gym  
7 area disclosed an altered 32 oz mug and two items of inmate to inmate correspondence in Ms.  
8 Opel's work area. Dkt. 7, p. 15. This infraction is apparently attached to the complaint as  
9 support for Ms. Opel's allegations regarding discrimination or harassment.

10 Ms. Opel also attached a number of grievances to her complaint. In grievance I.D. No.  
11 13543861 Ms. Opel complains because she was told to return to her cell when she was caught  
12 brushing her teeth in the bathrooms during a tier check at 11:00 P.M. Dkt. 7, p. 17. In  
13 grievance, I.D. No. 12520601, Ms. Opel complains that tier representatives made an  
14 announcement that involved her situation regarding a room move and that she was embarrassed.  
15 Dkt. 7, p. 19. The prison response to this grievance offered an apology about a  
16 miscommunication between defendant Rosendale and the tier representatives. Dkt. 7, p. 19. The  
17 next grievance attached to the complaint is, I.D. No. 12520624. In this grievance Ms. Opel states  
18 that she accidentally placed outgoing legal mail in the regular mail box and the officer refused to  
19 return the letter to her. Dkt. 17, p. 20.

20 In grievance I.D. No 12520621 Ms. Opel states that she left her cell after hours to use the  
21 bathroom and was told to return to her cell. When she stated that she needed to use the bathroom  
22 she was told to proceed "to the restroom now." Dkt. 17, p. 22. Ms. Opel was given a general  
23 infraction because of this incident and she attached that infraction to the complaint. Dkt. 7, p.

1 27. The infracting officer stated that there had been two announcements that the day room was  
2 closed and Ms. Opel continued to stand at the bottom of the stairs talking to offender Van  
3 Hooser. After the third announcement Ms. Opel stood in her door talking to offender Van  
4 Hooser. When the officer told her to stop her conversation and go into her room plaintiff replied  
5 that she was going to the bathroom and that while walking to the bathroom plaintiff continued to  
6 talk to offender Van Hooser. Dkt. 7, p. 27. The officer reports on the infraction form that it was  
7 11:41 p.m. when this incident occurred. *Id.*

9 In another grievance Ms. Opel complained of discrimination because her request to  
10 change roommates was denied. Dkt. 7, p. 25. The response to this grievance informed her that  
11 room moves were part of classification and could not be grieved. Ms. Opel also attached a kite  
12 to her complaint in which Defendant Rosendale denied plaintiff's request to room with offender  
13 Van Hooser. Dkt. 7, p. 26.

15 Ms. Opel attaches another general infraction where she was infracted on April 30, 2012,  
16 for filling her hot water bottle from the tap on a hot water machine. Dkt. 7, p. 28. In the  
17 infraction defendant Troutd states that there is a sign telling the inmates “[d]o not fill hot water  
18 bottles.” *Id.* In a letter to Officer Troutd Ms. Opel states that there were other people in line  
19 doing the same thing but that they were not infracted. Dkt. 7, p. 29.

20 In a letter to defendant Labon Ms. Opel complains that after a soccer game when the  
21 lower tier showers were full she noticed other offenders were being allowed to use the upstairs  
22 showers but that when she asked to use the upstairs shower she was told to wait until a shower  
23 was available. Dkt. 7, p. 30. In this letter Ms. Opel states that she feels that she is being targeted  
24 since she was released from segregation. *Id.*

26 Defendants move to dismiss and raise five arguments which are summarizes as follows:

1. Insufficient factual allegation against any named defendant.
2. There is no liberty interest in a disciplinary hearing that does not result in loss of  
good time.
3. Failure to state an Equal Protection claim because plaintiff does not claim to be  
part of a protected class.
4. Qualified immunity.
5. Stay of discovery.

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8 Dkt. 20, p. 4.

9 Ms. Opel filed a five page response and she attaches many of the same documents she  
10 attached to the complaint. In this response Ms. Opel identifies the hearing officer from her  
11 January 6, 2012, serious infraction hearing as Officer Larocco. Officer Larocco is not a named  
12 defendant in this action. Dkt. 7. Ms. Opel states that the infracting officer recanted his statement  
13 after the disciplinary hearing and that he admits that offenders Van Hooser and Opel were not  
14 actually in the equipment cage. Dkt. 25. Ms. Opel also cites to RCW 49.60.010 which is a state  
15 anti discrimination law. Ms. Opel concedes that her Fourth Amendment and substantive due  
16 process claims are without merit but contends her procedural due process claim  
17 should proceed, although not against all defendants. Dkt. 25.

18  
19 **STANDARD OF REVIEW**

20 A court may grant a motion to dismiss for failure to state a claim under Fed. R. Civ. P.  
21 12(b)(6), "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his  
22 claim that would entitle him to relief." *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983)  
23 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 [1957]). "Dismissal can be based on the lack of a  
24 cognizable legal theory or the absence of sufficient facts alleged under a cognizable theory."  
25 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

1 On a motion to dismiss, material allegations in the complaint are taken as admitted and  
2 the complaint is liberally construed in favor of plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411,  
3 421 (1969), *reh'g denied*, 396 U.S. 869 (1969); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th  
4 Cir. 1977). Where a plaintiff is proceeding *pro se*, his allegations must be viewed under a less  
5 stringent standard than allegations of plaintiffs represented by counsel. *Haines v. Kerner*, 404  
6 U.S. 519 (1972), *reh'g denied*, 405 U.S. 948 (1972). While the court can liberally construe a  
7 plaintiff's complaint, it cannot supply an essential fact an inmate has failed to plead. *Pena v.*  
8 *Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (quoting *Ivey v. Board of Regents of University of*  
9 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

## 11 DISCUSSION

12 To state a claim under 42 U.S.C. §1983, at least two elements must be met: (1) the  
13 defendant must be a person acting under color of state law, (2) and his conduct must have  
14 deprived plaintiff of rights, privileges or immunities secured by the constitution or laws of the  
15 United States. *Parratt v. Taylor*, 451 U.S. 527 (1981). Implicit in the second element is a third  
16 element of causation. See *Mt. Healthy City School Dist Bd. of Educ. v. Doyle*, 429 U.S. 274,  
17 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert. denied*, 449 U.S.  
18 875 (1980).

20 The inquiry into causation must be individualized and focus on the duties and  
21 responsibilities of each individual defendant whose acts or omissions are alleged to have caused  
22 a constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); see also *Rizzo v.*  
23 *Goode*, 423 U.S. 362, 370-71, 375-77 (1976). Sweeping conclusory allegations against an  
24 official are insufficient to state a claim for relief. Plaintiff must set forth specific facts showing a  
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1 causal connection between each defendant's actions and the harm allegedly suffered by plaintiff.  
2 *Aldabe*, 616 F.2d at 1092; *Rizzo*, 423 U.S. at 371.

3       **A. Personal Participation**

4       In order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must  
5 prove that the particular defendant has caused or personally participated in causing the  
6 deprivation of a particular protected constitutional right. *Arnold v. International Business*  
7 *Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Sherman v. Yakahi*, 549 F.2d 1287, 1290  
8 (9th Cir. 1977). To be liable for "causing" the deprivation of a constitutional right, each  
9 defendant must commit an affirmative act, or omit to perform an act, that he or she is legally  
10 required to do, and that defendant's conduct causes plaintiff's deprivation. *Johnson v. Duffy*, 588  
11 F.2d 740, 743 (9th Cir. 1978).

12       Additionally, defendants in a 42 U.S.C. § 1983 action cannot be held liable based on a  
13 theory of *respondeat superior* or vicarious liability. *Polk County v. Dodson*, 454 U.S. 312, 325  
14 (1981); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986). "At a minimum, a  
15 § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved, or  
16 knowingly acquiesced in the unconstitutional conduct." *Bellamy v. Bradley*, 729 F.2d 416, 421  
17 (6th Cir. 1984), *cert. denied*, 469 U.S. 845 (1984). Vague and conclusory allegations of official  
18 participation in civil rights violations are not sufficient. *Pena*, 976 F.2d at 471. Absent some  
19 personal involvement by defendants in the allegedly unlawful conduct of subordinates, they  
20 cannot be held liable under 42 U.S.C. § 1983. *Johnson*, 588 F.2d at 743-44.

21       In the complaint itself Ms. Opel provides very little detail as to how any particular  
22 defendant acted. Dkt. 7. However, she does state; "[u]pon my arrival back to MSU I began to

1 be harrassed [sic]. *See attached.*" Attached to the complaint are twenty-nine pages of exhibits  
2 that set forth facts involving a number of defendants and how they allegedly acted.

3       **1. Defendants Norm Caldwell, Alexis Stromberg, and Larry Belfor.**

4       These defendants, Caldwell, Stromberg, and Belfor are entitled to dismissal at the  
5 12(b)(6) stage because plaintiff has failed to allege any facts showing that these persons  
6 participated in causing any alleged constitutional violation.  
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8           **a. Defendant Norm Caldwell**

9       Defendant Caldwell is a custody program manager who responded to a letter Ms. Opel  
10 sent him. Dkt. 7, p. 5. In this letter defendant Cladwell informs Ms. Opel that her request for a  
11 room move should be addressed to the risk management team. *Id.* There is nothing in the letter  
12 showing that this defendant played any part in any decision regarding Ms. Opel's housing or  
13 room assignment. The inquiry into causation must be individualized and focus on the duties and  
14 responsibilities of each individual defendant whose acts or omissions are alleged to have caused  
15 a constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *see also Rizzo v.*  
16 *Goode*, 423 U.S. 362, 370-71, 375-77 (1976). There are no allegations of improper conduct  
17 against this defendant. Accordingly the undersigned recommends granting this defendant's  
18 motion to dismiss.  
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20           **b. Defendant Alexis Stromberg.**

21       The attachments to the complaint identify Mr. Stromberg as a classification counselor.  
22 Dkt. 7, p. 5 (letter from Caldwell dated September 7, 2012). In a grievance attached to the  
23 complaint plaintiff states that her "CUS and counselor are non-cooperative to any issue I have  
24 brought to their attention." Dkt. 7, p. 20. Ms. Opel has failed to plead any facts showing that  
25 this defendant's conduct deprived her of rights, privileges or immunities secured by the  
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1 Constitution or laws of the United States. *Parrett v. Taylor*, 451 U.S. 527 (1981). Plaintiff is not  
2 entitled to have prison officials agree with her or cooperate with her demands. Plaintiff has not  
3 pled any facts showing that this defendant violated any constitutional right. Accordingly the  
4 undersigned recommends granting this defendant's motion to dismiss.

5       **c.     Defendant Larry Belfor.**

6           Other than being named as a defendant on page three of the complaint, there is no other  
7 reference to Sgt. Belfor in the complaint or attachments. Dkt. 7, p. 3. Ms. Opel has failed to  
8 plead facts showing that this defendant participated in or caused any constitutional violation.  
9 Accordingly the Court recommends granting this defendant's motion to dismiss.

10       **2.     The Department of Corrections.**

11           Included in defendants' personal participation argument is an argument that the  
12 Department of Correction is not a proper party because the Department is not a person. Dkt. 20,  
13 pp. 6-7. Neither states nor state officials acting in their official capacities are "persons" for  
14 purposes of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).  
15 Section 1983 claims against states, therefore, are legally frivolous. *See Jackson v. Arizona*, 885  
16 F.2d 639, 641 (9th Cir. 1989). This rule applies equally to state agencies. *See Kaimowitz v.*  
17 *Board of Trustees of the Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1991); *Johnson v. Rodriguez*,  
18 943 F.2d 104, 108 (1st Cir. 1991). A governmental agency that is an arm of the state is not a  
19 "person" for purposes of § 1983. *See Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Flint v.*  
20 *Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007).

21           The Department of Corrections is not a "person" within the meaning of the Civil Rights  
22 Act. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *see also Alabama v. Pugh*, 438  
23

1 U.S. 781, 782 (1978) (*per curiam*); *Hale v. Arizona*, 993 F.2d 1387, 1399 (9th Cir. 1993).

2 Accordingly the undersigned recommends granting this defendant's motion to dismiss.

3       **3. Defendants Jane Parnell, Gina Rosendale, and Correctional Officers Labon,  
4 Troudt, Cooper, and Kaleopa.**

5           Defendants argue that they are entitled to dismissal at the motion to dismiss stage and  
6 there are no allegations against any of them except Ms. Parnell. Dkt. 20. Plaintiff states that she  
7 is being discriminated against and refers to numerous attachments. Dkt. 7, p. 3. In Ms. Opel's  
8 attachments are facts or allegations regarding defendants' actions. Liberally interpreting the  
9 complaint the unsigned finds that there are factual allegations that these defendants discriminated  
10 against plaintiff allegedly because of her looks or appearance. This could be a claim under the  
11 Equal Protection Clause of the Fourteenth Amendment.

12           An equal protection claim under the Civil Rights Act, 42 U.S.C. § 1983, requires, as a  
13 necessary element, that defendants acted with the intent to discriminate. *Barren v. Harrington*,  
14 152 F.3d 1193, 1194 (9th Cir. 1998). To sustain an equal protection claim under 42 U.S.C. §  
15 1983, plaintiff needs to show purposeful discrimination. *See Draper v. Rhay*, 315 F.2d 193, 198  
16 (9th Cir. 1963) (inmate failed to show § 1983 violation in absence of "intentional or purposeful  
17 discrimination"). Mere evidence of disparate impact on minorities is insufficient. *Village of*  
18 *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 256 (1977);  
19 *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).

20           The Equal Protection Clause does not require conditions, practices, and rules at county  
21 and state correctional facilities to be identical. *Cooper v. Elrod*, 622 F. Supp. 373 (N.D. Ill.  
22 1985). The United States Supreme Court has observed that "showing that different persons are  
23 treated differently is not enough without more, to show a denial of Equal Protection." *Griffin v.*  
24

1     *County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964). In addition, plaintiff must  
 2 demonstrate that she was “treated differently [ . . . ] because [s]he belonged to a protected class.”  
 3     *Seltzer-Bey v. Delo*, 66 F.3d 961, 964 (8th Cir. 1995), (*citing Divers v. Department of Corr.*, 921  
 4 F.2d 191, 193 (8th Cir. 1990)).

5                 Plaintiff has not alleged that she belongs to a protected class. Instead she states that the  
 6 discrimination is based on her “appearance.” Dkt. 7, p. 4. This is a defect that Ms. Opel might  
 7 be able to cure by amendment of the complaint, but the Court cannot supply essential elements to  
 8 the complaint. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (*quoting Ivey v. Board of*  
 9 *Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Accordingly the  
 10 undersigned recommends granting defendants’ motion to dismiss but giving plaintiff the  
 11 opportunity to file an amended complaint only on this potential claim.

12                 **B. Due process in a disciplinary hearing.**

13                 Ms. Opel alleges her due process rights were violated when the hearings officer allegedly  
 14 turned off the tape recorder and told her not to bother filing an appeal. Dkt. 7, p. 3. Defendants  
 15 argue there is no right to due process unless goodtime credits are taken. Dkt. 20, p. Defendants  
 16 state:

17                 Even if Ms. Opel’s allegations were true, her due process claims must fail as it  
 18 appears she would not be entitled to the procedural due process protections set  
 19 forth in *Wolff v. McDonnell*. *See Sandin v. Conner*, 515 U.S. 472, 483-87 (1995)  
 20 (a prisoner has no federal or state protected liberty interest in due process when  
 21 the sanction imposed neither extends the length of his sentence nor is “atypical  
 22 and significant” in relation to the ordinary incidents of prison life). The  
 23 challenged disciplinary sanctions of ten days in segregation and four days of  
 24 room/cell confinement do not impose the type of hardship entitling Plaintiff to  
 25 procedural due process protections under *Sandin*. *Id.* at 483-84. Indeed, the Ninth  
 26 Circuit explicitly has found that administrative segregation falls within the terms  
 of confinement ordinarily contemplated by a sentence. *Toussaint v. McCarthy*,  
 801 F.2d 1080, 1091-92 (9th Cir. 1986).

Once segregation was imposed as a sanction for her conduct, the ten days that Ms. Opel spent in segregation was no longer administrative segregation, it was disciplinary segregation. Thus, *Toussaint v. McCarthy*, which addresses administrative segregation, is not completely applicable. However, an inmate has no right to be held at any specific custody level and plaintiff fails to show that a liberty interest is implicated by her short term stay in segregation. *Sandin v. Conner*, 515 U.S. 472, 486 (1995)(disciplinary segregation of 30 days did not implicate a liberty interest). Thus defendants are entitled to dismissal of this claim.

Further, even if a liberty interest was implicated by the potential loss of goodtime that Ms. Opel faced in her disciplinary hearing, she received all the due process mandated by the Supreme Court. Where length of incarceration and loss of good time are implicated by a prison disciplinary hearing, a prisoner is entitled to the following:

1. Advance written notice of the violation.
2. An opportunity to be heard.
3. An opportunity to present witnesses and evidence if doing so will not endanger the orderly operation of the facility.
4. Written findings.

*Wolff v. McDonnell*, 418 U.S. 539, 540 (1974). Ms. Opel does not allege that any of these items were missing or defective in her hearing. The attached finding of guilt shows that she received written findings. Dkt. 7, p. 8. Ms. Opel waived her right to 24 hours advanced written notice and she did not request any witnesses. Dkt. 7, p. 9. Further, Ms. Opel had an opportunity to be heard and she pled guilty to the general infraction. While the court can liberally construe a plaintiff's complaint, it cannot supply an essential fact an inmate has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (quoting *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Due Process does not mandate that prison officials record disciplinary hearings and not recording all or part of the hearing does not violate any duty

1 or right owed to Ms. Opel under the Due Process Clause. Thus, even assuming all material  
2 allegations of Ms. Opel's complaint as admitted and liberally construing those allegations in her  
3 favor, Ms. Opel can prove no set of facts in support of her due process claim.

4 In addition, there is no constitutional right to an appeal process when an inmate is found  
5 guilty in a prison disciplinary hearing. Ms. Opel does not have a right to force prison officials to  
6 agree with her and she cannot force them to dismiss the infraction. Again, even assuming all  
7 material allegations of Ms. Opel's complaint as admitted and liberally construing those  
8 allegations in her favor, this claim fails as a matter of law. Ms. Opel's allegation that the  
9 infracting officer allegedly changed his statement after the disciplinary hearing does not alter this  
10 analysis. When considering sufficiency of the evidence the inquiry is if there was any evidence  
11 supporting the infraction. *Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985) ("Ascertaining  
12 whether this standard is satisfied does not require examination of the entire record, independent  
13 assessment of the credibility of witnesses, or weighing of the evidence"). Ms. Opel's due  
14 process claim fails as a matter of law and defendants' are entitled to dismissal of this claim only  
15 as to the issue of equal protection.

16 **C. Equal protection violation.**

17 The undersigned addressed defendants' equal protection argument in the context of  
18 personal participation and noted that Ms. Opel has failed to allege that she was discriminated  
19 against because she belongs to a protected class. *Supra* at pp. 10-11. There is no reason to  
20 repeat that analysis here.

21 The undersigned recommends granting defendants' motion to dismiss on this issue but  
22 giving plaintiff the opportunity to file an amended complaint if she believes she can state a claim  
23 only as to the issue of equal protection.

#### **D. Qualified immunity.**

Defendants raise the defense of qualified immunity but provide no briefing in support of their argument. Dkt. 20. The undersigned will not consider this unbriefed issue. Further, as noted above, the undersigned has found, after viewing the facts in the light most favorable to Ms. Opel, that she has failed to pled facts showing a violation of her constitutional rights. Therefore, the Court need not further address the issue of qualified immunity.

#### **E. Stay of discovery.**

The defendants requested a stay of discovery during the pendency of a dispositive motion. In light of the Court's recommendation to dismiss plaintiff's complaint with leave to amend, this issue need not be addressed at this time.

#### F. Other allegations.

In her compliant Ms. Opel complains that certain unnamed officers are referring to a barrier that keeps inmates out of an area as “Opel Gate.” Dkt. 7, p. 3. Defendants did not address this allegation in their motion to dismiss. This activity does not rise to the level of a constitutional violation and is nothing more than verbal harassment. *See Otarzewski v. Ruggiero*, 830, F.2d 136, 139 (9th Cir. 1987)(verbal harassment or abuse is insufficient to state a claim).

## CONCLUSION

The undersigned recommends that defendants' motion to dismiss (Dkt. 20) be **GRANTED IN PART AND DENIED IN PART**. Plaintiff should be given the opportunity to file an amended complaint limited to her equal protection claim.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for

1 purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit  
2 imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **November 21,**  
3 **2014** as noted in the caption.

4 **DATED** this 27<sup>th</sup> day of October, 2014.  
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Karen L. Strombom  
United States Magistrate Judge